

AQUALLIANCE

DEFENDING NORTHERN CALIFORNIA WATERS



September 29, 2016

Anthony Navasero, Senior Engineer
Delta Stewardship Council
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Re: Delta Stewardship Council's Final Addendum to the Delta Plan Programmatic Environmental Impact Report.

Dear Mr. Navasero:

AquAlliance, the California Sportfishing Protection Alliance, and the California Water Impact Network (hereinafter "AquAlliance") submit the following comments and questions for the Delta Stewardship Council's Final Addendum to the Delta Plan Programmatic Environmental Impact Report ("FA").

AquAlliance exists to sustain and defend northern California waters. We have participated in past water transfer processes, commented on past transfer documents, and sued the U.S. Bureau of Reclamation ("Bureau") three times over water transfers since 2010. AquAlliance communicated by phone and e-mail with Kevan Samsam of your staff in November 2015 regarding water transfer impacts and commented on the DSC's draft Addendum to the Delta Plan Programmatic Environmental Impact Report in June 2016. In doing so we seek to protect the Sacramento River's watershed in order to sustain family farms and communities, enhance Delta water quality, protect creeks and rivers, native flora and fauna, vernal pools and recreational opportunities, and to participate in planning locally and regionally for the watershed's long-term future.

I. Delta Plan Court Rejection Should Delay All Rule Making

The DSC's decision to appeal Judge Michael Kenny's May 2016 ruling allows the DSC to continue to attach the Addendum to the Delta Plan's Environmental Impact Report ("EIR"). We

would like to remind the DSC of part of his clarifying ruling: “To be clear, the Delta Plan is invalid and must be set aside until proper revisions are completed. As Respondent itself argued previously, in light of an invalid Delta Plan, there is no proposed project, and consequently nothing before the Court to review under CEQA [California Environmental Quality Act]. The Court does not believe that piece-meal CEQA review is feasible under circumstances in which significant Plan revisions are required.”¹ DSC’s decision to plough ahead with the present rulemaking process in light of Superior Court’s complete invalidation of the Delta Plan and its CEQA compliance is troubling to say the least. AquAlliance asks for DSC to expressly clarify that, at such time the DSC appeal becomes final, and the Delta Plan remains invalidated, so too would this proposed rule, if adopted, be set aside.

II. The FA Rejects Relevant Information Regarding Water Transfers

The FA rejects relevant information about water transfers provided by AquAlliance by claiming that the comments submitted on past water transfers, the DSC’s EIRs, and the Bay Delta Conservation Plan/WaterFix’s environmental review documents “[a]re not comments on the Proposed Project or on this Addendum.” (FA p. 113) On the contrary, at issue is the question of whether water transfers may significantly impact attainment of DSC’s co-equal goals, and AquAlliance’s prior comments provided substantial evidence based on fact, including expert opinion, and review of both past and proposed water transfers, demonstrating multi-faceted water transfer impacts upon environmental conditions, as well as water supplies, in the Delta. DSC’s blanket refusal to consider this information is arbitrary, capricious, and evinces a predetermination and prejudgment of the outcome of the rulemaking project.

II. Impacts Acknowledged by USBR and SLDMWA (“Lead Agencies”) Are Ignored

The DSC accepted conclusions found in the *Long-Term Water Transfers Environmental Impact Statement/Environmental Impact Report, Final* while ignoring the lead agencies’ disclosure of significant impacts from water transfers. That EIS/EIR uncovered numerous potentially significant adverse impacts from water transfers to environmental health, and water supplies. To address these concerns, the EIS/EIR sets forth a number of highly complex and highly questionable mitigation measures that fail to include demonstrable performance standards, fail to rely on adequate monitoring, rely on third party participation, and wait until impacts occur before evaluating appropriate mitigation measures. DSC must recognize that the Bureau and SLDMWA have identified numerous impacts of water transfers, dispelling DSC’s conclusion that transfers could have no possible impact to DSC’s co-equal goals. For example:

- “But FWS also recognized “some uncertainty” about how snakes will respond. AR7943. Reclamation’s proposed adaptive approach was therefore “important” to address uncertainties and “adapt the program as new scientific information becomes available.” AR7943. In summary, FWS explained that
[s]nakes are likely to be exposed to adverse effects from the proposed rice field following and crop shifting.... [T]ake is expected to be in the form of harm as displaced snakes may be taken by predators or may die or suffer reproductive failure if they cannot successfully relocate and utilize habitat or adjacent to a field

¹ Kenny, Judge Michael 2016. Motions for Clarification. p. 4.

followed

AR7945. In short, the Final BiOp acknowledged and reasonably assessed the effects of Reclamation's proposed action on the snake, and ultimately concurred that the action was "likely to adversely affect the snake." AR7914.8"²

- "Significant effects could include vegetation losses due to lowered groundwater tables, permanent land subsidence (which is caused by lowering of groundwater levels below historically recorded lows), and degradation of groundwater quality."³
- "Groundwater substitution transfers under the Proposed Action could decrease groundwater levels, potentially affecting non-transferring wells near participating substitution wells."⁴
- "The Proposed Action and these other projects in the basin could have significant cumulative effects on groundwater resources."⁵

III. The FA Fails to Acknowledge Absence of CEQA Review of SWRCB Jurisdictional 'One-Year' Transfers

The DSC defers to other agencies to deal with transfers such as the SWRCB, but fails to note that in place of CEQA, California Water Code Sections 1725 through 1732 occupies this area of administrative action by the SWRCB and sets legal standards by which the Board is to review petitions for temporary changes (to points of diversion, places of use, and purposes of use) to water rights licenses and permits. The SWRCB asserts that, "Temporary Transfers: These types of transfers are statutorily exempt from CEQA. The petition must still be evaluated to confirm that the transfer will not result in an unreasonable effect on fish, wildlife or other instream beneficial uses."⁶ However, we point out here and have many times in the past to the SWRCB, that many of the so-called short-term or one-year transfers by State Water Project and Central Valley Project contractors are serial in nature, occurring often in successive years, and represent another increment of a "project" that is improperly exempted from CEQA. AquAlliance believes that, unlike in the case of *Sierra Club v. The West Side Irrigation District* (2005), these serial transfers from the same seller should be treated as a long-term transfer (one that represents a transfer of water recurring over a period greater than one year), and is subject to CEQA review and should be a DSC covered action most particularly because the SWRCB has turned a blind eye to the issue. This was not considered by the DSC. It is simply inappropriate for DSC to rely on a state agency's temporary CEQA exemption for the proposition that relevant transfers will be conducted in accordance with CEQA if in fact no CEQA review will occur. This fails to satisfy DSC's CEQA duties here.

IV. The FA Only Discusses Theoretical Transfers

The DSC exempts all future transfers, but they are theoretical transfers in the draft and final Addenda, not even any actual transfer(s). Changing conditions, changing transfer quantities and types, and cumulative conditions are all rejected with the DSC proposal to eliminate so-called one-year transfers as a covered action under the Delta Reform Act. It is noticeable and negligent that

² USBR 2016. Reply brief, *AquAlliance et al. v. United State Bureau of Reclamation et al.* p. 30

³ SLDMWA 2016. Reply brief, *AquAlliance et al. v. United State Bureau of Reclamation et al.* p. 16

⁴ USBR et al. 2015. *Long-Term Water Transfer* Final EIS/EIR p. 3.3-160.

⁵ *Id.* p. 3.3-170.

⁶ http://www.waterboards.ca.gov/waterrights/water_issues/programs/petitions/#transfers

the DSC failed to disclose that DWR and the Bureau acknowledge uncertainty in transfers.⁷ Despite referencing the DWR and Bureau's *DRAFT Technical Information for Preparing Water Transfer Proposals* ("White Paper") the DSC continues to conclude that "[s]ingle-year water transfers that are conveyed through the Delta do not have a significant impact on the coequal goals of statewide water supply reliability and the protection, restoration, and enhancement of the Delta ecosystem, and so are not regulated as covered actions under the Delta Reform Act."⁸

DWR and Bureau's White Papers (2013, 2014, 2015) refute this with statements that reveal the need to review water transfers on a case-by-case basis, such as:

- "The Project Agencies evaluate each transfer on a case-by-case basis considering the specific water year and hydrologic conditions for each individual transfer." p. 1
- "Although this document seeks to identify the information needed for transfer approval in the clearest and most complete way possible, to both expedite that approval and to reduce participant uncertainty, each transfer is unique and must be considered on its individual factual merits." p. 3.
- "The Project Agencies will evaluate proposals for transfers originating in the Yolo Bypass/Tule Canal or Delta areas on a case-by-case basis. Many uncertainties exist with transfers originating from the Yolo Bypass/Tule Canal or Delta, including how much water can be made available and whether the transfer water can be exported by the projects."

A blanket exception to DSC review for so called one-year water transfers not only ignores facts and positions by DWR and the Bureau, but also the public. AquAlliance attempted to inform you with documents submitted with our comments on the draft Addendum. Here is additional material in the form of excerpts from our first amended complaint challenging the *Long-Term Water Transfer Program's* EIS/EIR. Examples include, but are not limited to:

- "Furthermore, the EIS/EIR fails to include sufficient information to determine whether the applicable "streamflow depletion factor" to be applied to any single transfer project will mitigate significant impacts, instead deferring development of the specific measures to future agency review based on unknown future monitoring data and conditions, and without clear performance standards."⁹
- "When water quality standards for inflow, outflow, and salinity are relaxed and/or exceeded, the process is further aggravated. Adding transfers during such drought conditions when emergency barriers across certain waterways are in place, the Delta Cross Channel gates are open, low inflows are occurring, and there are low outflows, further worsens conditions for fish and other aquatic life."¹⁰
- "Transfer water is released from reservoirs in summer; during drought years there may be limited cold-water pool to sustain downstream fish populations through the summer and

⁷ DWR et al. 2013, 2014, and 2015. *DRAFT Technical Information for Preparing Water Transfer Proposals*.

"Although this document seeks to identify in the best and most complete way possible the information needed for transfer approval, to both expedite that approval and to reduce participant uncertainty, each transfer is unique and must be considered on its individual factual merits, using all the information that is available at the time of transfer approval and execution of the conveyance or letter of agreement with the respective Project Agency in accordance with the applicable legal requirements." p. 3.

⁸ Delta Stewardship Council 2015. Staff report agenda item 13, p. 1.

⁹ AquAlliance et al. 2016. First amended complaint, *AquAlliance et al. v. United State Bureau of Reclamation et al.* p. 12.

¹⁰ *Id.* p. 17.

fall. But transfer water exported from the Delta is not the same water released from the reservoirs. Water exported is a combination of Sacramento River inflow, San Joaquin River inflow, and Delta low-salinity (brackish) water from the North, Central, and West Delta. Sacramento River inflow includes flows from the Feather, Yuba, and American rivers, as well as many smaller rivers and streams.”¹¹

- “These transfers will result in additional impacts to in-stream water levels, water quality and circulation critical to the existence of these endangered and threatened species and their critical habitats. The Project will lead to additional pumping in the south Delta, increasing take of Delta smelt and other endangered and threatened species beyond those levels that would occur in a drought year absent the transfers. This pumping above what would otherwise be baseline in a year like this also causes reverse flows, which have a negative effect on the survival of the Delta smelt. Additionally, to the extent the problems with the water accounting related to the transfers is incorrect, resulting degradation of water quality further jeopardizes these species’ survival.”¹²

Again, it was arbitrary and capricious, and evinces a predetermination of the project, for the DSC to flatly reject any consideration of AquAlliance testimony and other agencies’ documents regarding actual transfer projects; and similarly arbitrary for DSC to fail to conduct a review of actual water transfer projects on its own.

V. The Project is Not Exempt from CEQA

DSC asserts that this rulemaking will not possibly result in any physical change to the environment. On the contrary, DSC’s blanket approval that all water transfers passing through the Delta forever more will receive no review and approval for consistency with the Delta Plan will both greatly increase the frequency of water transfers, and do so without the benefit of any attempt to meet the co-equal goals. Thus, transfers will be more frequent, and less regulated. Similarly, other federal, state, and local agencies will look to this DSC conclusion as validation for shortcutting their own CEQA review: if the DSC believes transfers can have no conceivable impact to the Delta, why should they think otherwise?

In fact, nothing could be further from the truth. As demonstrated in ample technical review and comment, and in the Bureau and SLDMWA EIR itself, water transfers have direct and tangible impacts to water supplies and environmental health. Moreover, AquAlliance strongly disagrees with the proposed logic that, since transfers have never been regulated by the DSC, this proposed exemption results in no change. On the contrary, upon the creation of the DSC and the adoption of the Delta Plan, water transfers clearly fell within the ambit of covered activities, owing to the tangible environmental changes they create. The DSC’s temporary water transfer exemption, while misguided, was temporary only, and recognized this potential impact. In contrast, here, the DSC proposes to make such exemption permanent, while asserting that transfers may have no potential impact. This constitutes a significant regulatory change that is inappropriate for any CEQA exemption. As the DSC is fully aware, the Delta finds itself in special and chronic circumstances of oversubscription from water users, with under-availability of habitat flows. In this already depleted and degraded environment, any impacts, however small, take on greater

¹¹ *Id.*

¹² *Id.* p. 18.

magnitude, as do the cumulative impacts of year after year transfers. The DSC ignores this environmental conditions, and changing regulatory schemes, in inappropriately proposing a CEQA exemption for this project.

VI. Additional Issues

1) The public comment period on the FA closes today, September 29, 2016 although the mailed notice provides no time (the web states it is 5 p.m.). The public hearing is being held today as well and action is sought by the Council.¹³ Part of the action sought is approval by the Council that will enable “[t]he Executive Officer discretion to make changes required by the OAL in order to comply with requirements of the California Administrative Procedure Act (APA), and inform the Council of any such changes.”¹⁴ This may follow the letter of the law, but not the intent. The Council will not have the benefit of written comments that are provided during the meeting and after their decisions are made on Agenda Item 10, *Single-Year Water Transfers Amendments*. We believe that the Council would be better served by delaying their final decision(s) until after the complete close of the comment period today.

2) It must also be noted that the DSC failed to disclose that DWR was not part of any short or long-term environmental review of water transfers in many years.

3) Water Code Section 85021 requires that all regions of California reduce their dependence on water imported from the Delta: “The policy of the State of California is to reduce reliance on the Delta in meeting California's future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency. Each region that depends on water from the Delta watershed shall improve its regional self-reliance for water through investment in water use efficiency, water recycling, advanced water technologies, local and regional water supply projects, and improved regional coordination of local and regional water supply efforts.” How is this proposal to classify, so called one-year transfers as uncovered actions, adhering to this requirement?

4) The FA claims that “overall” Sacramento Valley groundwater levels have remained “[r]elatively stable over the past 40 years.” As AquAlliance demonstrated in our comments on the draft Addendum (Table 2), there is nothing remotely close to stable about the groundwater elevations in specific areas where there are water sellers, such as Glenn Colusa Irrigation District.¹⁵ The position that “overall” levels are stable blurs the distinctions between the FA’s

¹³ DSC staff 2016. *Agenda Item: 10 Meeting Date: September 29-30, 2016 Page 1 ACTION ITEM Single-Year Water Transfers Amendments* “Staff will recommend that the Council adopt (via the Resolution attached hereto as Attachment 6): (1) the Addendum to the Delta Plan Programmatic Environmental Impact Report (Addendum) that evaluates impacts of the proposed single-year water transfers amendments, (2) the Statement of Exemption from the California Environmental Quality Act (CEQA), and (3) the Single-Year Water Transfers Amendments. The Resolution also (4) directs the Executive Officer to correct any errata or non-substantive changes identified at this meeting, and to (5) finalize all elements of the rulemaking package and submit it to the Office of Administrative Law (OAL) once that is complete. Last, it (6) grants the Executive Officer discretion to make changes required by the OAL in order to comply with requirements of the California Administrative Procedure Act (APA), and inform the Council of any such changes.” p. 1.

¹⁴ *Id.*

¹⁵ http://www.water.ca.gov/groundwater/data_and_monitoring/northern_region/GroundwaterLevel/gw_level_monitoring.cfm#Well

valley-wide overview and specific geographic locations that have significant groundwater elevation declines, signs of subsidence, and streamflow depletion. This is a major shortcoming in the FA.

VII. Conclusion

AquAlliance, CSPA, and C-WIN have demonstrated in our multiple comment letters on the Delta Plan's DPEIR, the Revised Draft PEIR, lawsuit, comments on the draft Addendum, and here that the approved Final PEIR is inadequate. The court's ruling agrees with this position. For this and the many reasons discussed above, the Addendum should be withdrawn.

Our groups respectfully requests notification of any meetings or actions that address this Addendum or water transfers before the DSC.

Sincerely,



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